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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

MAXIMILIAN KLEIN and SARAH
GRABERT, individually and on behalf of all
others similarly situated,

Plaintiffs,

v.

FACEBOOK, INC., a Delaware corporation
headquartered in California,

Defendant.

Case no.: 5:20-cv-08570-LHK

**SHERMAN PLAINTIFFS' RESPONSE TO
KLEIN PLAINTIFFS' MOTION FOR
ADMINISTRATIVE RELIEF TO
CONSIDER WHETHER CONSUMER
CASES SHOULD BE RELATED
PURSUANT TO CIVIL LOCAL RULE 3-12**

1 Plaintiffs Vickie Sherman, Lezah Neville-Marrs, Katherine Loopers, and Jarred
 2 Johnson representing putative classes in *Sherman et al. v. Facebook, Inc.*, No. 3:20-cv-08721-
 3 JSW (*Sherman* Plaintiffs), agree with Plaintiffs in *Klein et al. v. Facebook, Inc.*, No. 5:20-cv-
 4 08570-LHK (*Klein* Plaintiffs), that the currently pending antitrust class actions against
 5 Facebook should be assigned into one of two unrelated groups. *Sherman* Plaintiffs also
 6 submit this response to clarify that *Sherman* is not an outlier from the *Klein* group,¹ but is
 7 distinguished from *Reveal Chat Holdco LLC et al. v. Facebook, Inc.*, No. 5:20-cv-00363-BLF,
 8 and *Affilious, Inc. et al. v. Facebook, Inc.*, No. 4:20-cv-09217-KAW, (*Klein* Plaintiffs refer to
 9 *Reveal Chat* and *Affilious* in their motion as the “*Reveal Chat* group”), despite the ostensible
 10 overlap between the putative classes in *Affilious* and *Sherman*, of persons and entities who
 11 purchased Facebook advertising services (Advertiser class).

12 ***Sherman* is related to *Klein***, and thus belongs in the “*Klein* group.” *Sherman*
 13 Plaintiffs’ motion to relate *Sherman* to *Klein* rather than to *Reveal Chat* is pending before this
 14 Court. *Klein*, Dkt. 19. *Klein* Plaintiffs do not oppose *Sherman* Plaintiffs’ motion to relate
 15 *Sherman* to *Klein* rather than to *Reveal Chat*. Mot at 3. Additionally, *Sherman* Plaintiffs have
 16 opposed Facebook’s motion to relate *Sherman* to *Reveal Chat*. *Reveal Chat*, Dkt. 94.

17 *Sherman* can and should be added to the motion’s chart illustrating case similarities.
 18 Mot. 4-5. Just like all four cases listed on that chart, *Sherman* has two individual Facebook
 19 users, Vickie Sherman and Lezah Neville-Marrs (*Sherman* Compl. ¶¶12-17); *Sherman*
 20 identifies relevant markets to include “Online Social Networks” and “Online Social Media”
 21 in the United States (*Sherman* Compl. ¶¶145-160); *Sherman*’s putative classes include the
 22 Antitrust Facebook User Class and Unjust Enrichment Class (*Sherman* Compl. ¶181); and
 23 Facebook’s anticompetitive deception of consumers is at the core of *Sherman*’s allegations
 24 regarding Facebook’s acquisition and maintenance of monopoly power. (*Sherman* Compl.
 25 ¶¶79-100.)

26
 27 ¹ See Mot at 1, *Klein et al. v. Facebook, Inc.*, No. 5:20-cv-08570-LHK, *Kupcho v. Facebook, Inc.*, No.
 28 4:20-cv-08815-JSW; *Dames et al. v. Facebook, Inc.*, No. 3:20-cv-08817-HSG; and *Steinberg v.*
Facebook, Inc. 3:20-cv-09130-VC are collectively referred to as the “*Klein* group”

1 The additional advertising class and associated antitrust harms do not make *Sherman*
 2 less related to *Klein* or related to *Reveal Chat*. Indeed, the *Klein* cases acknowledge
 3 advertising's dominant contribution to Facebook's revenue. Like users, advertisers are
 4 consumers who are harmed by Facebook's monopoly power, which was achieved through
 5 the same anticompetitive conduct that harms Facebook's users. The putative advertising
 6 class *Sherman* represents does not consist of purchasers of data,² but purchasers of *advertising*
 7 *services* and *placements*. The antitrust harms suffered by advertisers and users alike concern
 8 the same deceptive conduct by Facebook, as alleged in both *Klein* and *Sherman*. For
 9 example, as *Sherman* points out, users receive a lower quality product, and advertisers pay
 10 higher prices for lower quality ads and ad placement services, as a result of Facebook's
 11 monopoly achieved through deceptive conduct. *Sherman* Compl. ¶¶ 63-64, 77.

12 Facebook's monopoly in the display advertising market is not separate and distinct
 13 from, but is in fact dependent upon, its monopoly in the social networking and social
 14 media markets. Indeed, advertisers are beholden to Facebook because of Facebook's all-
 15 encompassing *reach* in social media and social networking as well as vast troves of data
 16 achieved through deceptive practices.

17 **For the same reasons *Sherman* is related to *Klein*, it is unrelated to *Reveal Chat***
 18 **and *Affilious*.** *Sherman* Plaintiffs filed a response opposing *Affilious* Plaintiffs' motion to
 19 relate *Affilious* to *Reveal Chat* solely on the premise that the allegations contained in *Affilious*³
 20 are inconsistent with the definition of the advertiser class *Affilious* purports to represent. A
 21 case (such as *Sherman*) involving a class of Facebook users, and a class of advertisers who
 22 purchased advertising on Facebook, does not involve similar markets, plaintiffs, or antitrust
 23 harms as a case with a class consisting of app developers. *Sherman* and *Affilious* involve
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 25

26 ² *Reveal Chat* and *Affilious* focus on plaintiffs who were harmed by being excluded from the social
 27 data market, including purchase of user data. *Klein* similarly mentions purchasers of user data in their
 28 complaint. *Sherman* Plaintiffs do not include purchasers of data.

³ The factual allegations in *Affilious* are nearly identical to those in *Reveal Chat*.

1 entirely different legal theories, transactions, market definitions, business considerations,
2 business units within Facebook, economic realities, and historical conduct.

3 Although both *Sherman* and *Affilious* plaintiffs purport to represent an advertiser
4 class, except for swapping out app developer plaintiffs for advertiser plaintiffs, the *Affilious*
5 and *Reveal Chat* complaints mirror each other almost identically.⁴ As highlighted by *Klein*
6 plaintiffs in their motion, *Reveal Chat* and *Affilious* were filed by the same plaintiffs' counsel.
7 *Affilious* purportedly represents advertisers but alleges the same factual allegations as *Reveal*
8 *Chat's* case on behalf of app developers. This is particularly problematic because varying
9 class definitions create meaningful differences that weigh against relation. *See Tecson v. Lyft,*
10 *Inc.*, No. 18-cv-06782-YGR, 2019 WL 1903263, at *3 (N.D. Cal. Apr. 29, 2019) (“[T]he
11 factual inquiries for each putative class would be unique because the class putative
12 members have different relationship with [the defendant].”). Hence, aside from the mere
13 listing as advertisers as plaintiffs in *Affilious*, *Sherman* has no more overlap with *Affilious* or
14 *Reveal Chat* than do cases in the *Klein* group.

15 Any ostensible or asserted factual overlap between *Reveal Chat*, *Affilious*, and *Sherman*
16 in advertising markets is a red herring. *Reveal Chat's* allegations are limited to Facebook's
17 conduct *only* as it relates to mobile applications in the mobile environment, which is
18 inconsistent with representation of a broad class of advertisers as defined by both *Affilious*
19 and *Sherman*. Unlike *Reveal Chat*, *Sherman's* allegations depend upon Facebook's broad
20 collection of data and surveillance across several mediums including *any* means of
21 connection to Facebook's services from desktop to mobile devices, even aggregating user
22 activity across multiple devices. *Sherman* at ¶¶ 88, 152.

23 Indeed, while claiming to represent advertisers, the *Affilious* complaint is
24 overwhelmingly about Facebook's conduct as to mobile apps, APIs, and app developers.

25 _____
26 ⁴ The allegations in *Reveal Chat* and *Affilious* are nearly identical except for the definition of Plaintiff
27 class. Attached as **Exhibit 1** is the *Affilious* complaint with highlighted sections showing any
28 differences from, or material added in addition to the *Reveal Chat* complaint representing a class of
app developers. The dearth of new allegations glaringly illustrates that *Affilious* is nothing more than
Reveal Chat with new plaintiffs.

1 The *only* Facebook advertising product mentioned in the allegations of *Affilious* is NEKO, a
 2 mobile advertising product that has long been extinguished at Facebook for several years.
 3 *Affilious* Dkt. 1 ¶ 6. NEKO is mentioned nowhere in *Sherman*, and *Affilious* fails to tether its
 4 factual allegations specifically to an advertiser class other than alleging payment of
 5 “supracompetitive prices.” *Sherman* alleges far more harm to advertisers and users, arising
 6 from completely different anticompetitive conduct not even mentioned in *Affilious*. Indeed,
 7 the “technology and economic structure” alleged in *Affilious* and *Reveal Chat* is narrowly
 8 limited to Facebook’s exclusion of app developers and Facebook’s “NEKO” platform.
 9 *Sherman*, in contrast, seeks redress on behalf of advertisers who allege Facebook’s
 10 anticompetitive conduct beyond the mobile app environment.

11 Finally, the class definitions in *Affilious* make the distinction from *Sherman*, strikingly
 12 clear. *Affilious* defines two separate classes: “the pre-2018 nationwide advertiser class” and
 13 the “post-2018 advertiser class.” *Affilious*, Dkt. 1, ¶¶ 411-416. *Affilious* presents
 14 advertisers as competitors of Facebook, just as app developers are presented as
 15 competitors of Facebook in *Reveal Chat*. In contrast to *Affilious* (and *Reveal Chat*), *Sherman*
 16 makes no pre- and post-2018 distinction, but defines its advertiser class (and marketer issue
 17 subclass) as “All persons and entities in the United States who, from January 1, 2014 to the
 18 present, directly paid Facebook for advertising services” (or in the case of marketers, paid
 19 Facebook directly as an intermediary). *Sherman*, Dkt. 1, ¶ 181. *Sherman* also does not present
 20 advertisers as competitors of Facebook, but as consumers who have been exploited by
 21 Facebook’s monopoly.

22 Accordingly, *Sherman* should be related to *Klein* and not to *Affilious* or *Reveal Chat*.
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Respectfully submitted,

Dated: January 8, 2021

/s/ Tina Wolfson

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CERTIFICATE OF SERVICE

Pursuant to Local Rule 5.5, I hereby certify that on January 8, 2021, I caused the foregoing to be electronically filed with the Clerk of the Court. I understand that the Court will provide electronic notification of and access to such filing to the counsel of record in this matter who are registered on the CM/ECF.

DATED: January 8, 2021

AHDOOT & WOLFSON PC

/s/ Tina Wolfson

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